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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Wet Seal, Inc.

Serial No. 76338469

Morris A. Thurston of Latham & Watkins LLP for Wet Seal, Inc.

Jason Turner, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

Before Hairston, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Wet Seal, Inc. has appealed from the final refusal of the trademark examining attorney to register the mark SEAL for the following goods, as amended:¹

Cosmetics, mascara, eye liners, eye brow pencils, eye shadow, artificial eyelashes, face powder, dusting powder, powder compacts containing make-up, rouge, liquid rouge, foundation, concealer, lipstick, lip liner, lip gloss and makeup remover; nail polish, nail polish remover, cuticle softener and cuticle cream; colognes, perfumes and toilet

¹ Application Serial No. 76338469, filed November 14, 2001, asserting a bona fide intention to use the mark in commerce.

waters; toothpaste, mouthwash and tooth gel; sun screen, sun block and suntanning preparations; antiperspirants, deodorants; aftershave lotions, shaving lotions and cream, shaving foam, after-shave balm, astringents, skin toner and skin tonic; body, hand and face lotions and creams; skin cleansers, soaps, bubble bath, toilet soap, bath and shower gels, bath oils, bath salts, bath crystals, body powders and talc, body spray and essential oils for personal use. Class 3.

Handbags, purses, backpacks, briefcases, cosmetic bags and toiletry cases sold empty, vanity cases sold empty, wallets and change purses. Class 18.

Cosmetic accessories, namely, cosmetic brushes, facial sponges for applying make-up and applicators for applying make-up; hair brushes. Class 21.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the following seven registered marks, all owned by different entities, as to be likely to cause confusion.²

HYDRO SEAL

For Non-medicated moisturizing component as used in ingredient complex in fragrance and toiletry products, namely - foam bath, shower gel, body lotion, fragrance spray, hand cream, moisturizing gel, exfoliating body scrub.³
Class 3.

² An initial refusal to register under Section 2(e)(1) of the Trademark Act was subsequently withdrawn.

³ Registration No. 2528395; issued January 8, 2002; owned by Avon Products, Inc.

HEAT SEAL

For hair care products, namely conditioners, gels, and sprays.⁴ Class 3.

SILKEN SEAL

For hair care preparations; namely, shampoos, conditioners, styling gels, hair sprays and hair glossers.⁵ Class 3.

SEAL 'N PROTECT

For Hair conditioner.⁶ Class 3.

SEALSKIN

For preparation for filling the skin pores with an innocuous material to keep out certain irritants.⁷ Class 3.

SEAL PAK

For fanny packs, hip packs, and waist packs.⁸
Class 18.

⁴ Registration No. 2424116; issued January 3, 2001; owned by John Paul Mitchell Systems.

⁵ Registration No. 1680023; issued March 24, 1992; renewed; owned by Avlon Industries, Inc. The word "SILKEN" is disclaimed.

⁶ Registration No. 1216213; issued November 9, 1982 on the Supplemental Register; renewed; owned by Dowbrands, Inc.

⁷ Registration No. 782185; issued December 22, 1964; renewed; owned by Kravitz, Rubin and Kravitz, Annabelle S. dba Cadet Laboratories Partnership.

⁸ Registration No. 1749402; issued January 26, 1993; renewed; owned by Cascade Designs, Inc. The term "PAK" is disclaimed.

SEALCO

For mail order services in the field of luggage.⁹ Class 42.

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

Here, as in any likelihood of confusion analysis, we look to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In particular, the Court stated that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and the differences in the marks."

When the relevant factors in this case are considered, we find there is no likelihood of confusion.

⁹ Registration No. 1884104; issued March 14, 1995; Section 8 affidavit accepted; owned by Skyway Luggage Company dba Sealco Corporation.

THE MARKS

The Examining Attorney contends that applicant's mark is similar to each registered mark in sound, appearance, connotation and overall commercial impression. Specifically, the examining attorney argues that "[t]he registrants' marks all contain the applicant's exact mark in its entirety"; that "[t]he only differences are the registrants' additional matter consisting of the terms 'CO,' 'HEAT,' 'PAK,' 'SILKEN,' 'N' PROTECT,' 'SKIN' and 'HYDRO'"; and that "[t]he disclaimed terms 'PAK' and 'SILKEN' and the other arguably descriptive or generic terms such as 'HEAT,' 'SKIN' and 'CO' [are] considered of lesser trademark significance than 'SEAL.'" (Brief, p. 4.)

We disagree with the examining attorney's analysis of these marks and instead find that when considered in their entirety, each of the cited marks is dissimilar to applicant's mark in sound, appearance, meaning and commercial impression.

It is true that applicant's mark "SEAL" is fully encompassed by each of the registered marks, HYDRO SEAL, HEAT SEAL, SILKEN SEAL, SEAL 'N PROTECT, SEALSKIN, SEALCO and SEAL PAK (stylized). However, that is where the similarities end. There are obvious differences in sound. Applicant's mark consists of a one-syllable word while each of the registered marks is at least two syllables. There are also differences in appearance.

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Applicant's mark is the single word SEAL while the registered marks all consist of the word SEAL either preceded or followed by another term.

Further, the additional term in each cited mark, whether suggestive (as in "HYDRO" and "HEAT"), or even descriptive ("SEAL 'N PROTECT," "CO," "SKIN") or disclaimed ("SILKEN" and "PAK"), imparts a meaning to "SEAL" that is different from the meaning conveyed by SEAL alone. It is well settled that "[n]o part of the mark can be ignored in comparing the marks as a whole." *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

The marks for goods in Class 3, HYDRO SEAL, HEAT SEAL and SILKEN SEAL, SEAL 'N PROTECT, and SEALSKIN, each suggests one or more specific functions of the skin or hair care products the mark identifies: HYDRO SEAL suggests that registrant's moisturizing component of hand cream seals moisture into the skin; HEAT SEAL for hair conditioner suggests that a heating process is used to seal protection into the hair; SILKEN SEAL suggests shampoo and hair conditioner that imparts a lasting silky feel or texture to the hair; SEAL 'N PROTECT describes hair conditioner that seals out and protects against harmful elements; and SEALSKIN for a skin pore-filling material suggests both protection from skin irritants and the resulting smooth texture of the skin.

Unlike the specific functions of the respective skin and hair products suggested by the combined terms in these marks, the single word SEAL in applicant's mark suggests only some vague, nonspecific function of applicant's various cosmetic products and accessories. As a further distinction, the word SEAL may even project a whimsical image that is entirely unrelated to any function of the identified goods.

The connotation of applicant's mark also differs from the connotation of the cited marks for the respective goods in Class 18 and services in Class 42. Applicant's mark SEAL suggests the texture or composition of its handbags and purses. The mark SEAL PAK, however, suggests a function of registrant's fanny packs and waist packs, in particular, the tight closure of the packs and security of the items contained therein. The mark SEALCO for mail order services in the field of luggage suggests a company name rather than any intrinsic characteristic of the service.

THE GOODS AND SERVICES

Not only are the marks dissimilar, but there is insufficient evidence in each case to establish that the respective goods and services are closely related.¹⁰

¹⁰ The examining attorney's only evidence consists of dictionary definitions of certain identified goods. We take judicial notice of these definitions, all of which were submitted for the first time with the examining attorney's appeal brief.

CLASSES 3 AND 21
Registration Nos. 2424116, 1680023, and 1216213

As to these registrations, the examining attorney argues that applicant's goods, broadly identified as "cosmetics," encompass the hair care products identified in Registration Nos. 2424116 (HEAT SEAL for hair care products, namely conditioners, gels, and sprays), 1680023 (SILKEN SEAL for hair care preparations, namely shampoos, conditioners, styling gels, hair sprays and hair glossers), and 1216213 (SEAL 'N PROTECT for hair conditioners); and that applicant's cosmetic sponges and applicators are companion items to the registrants' "cosmetic" products.

The dictionary listing submitted by the examining attorney defines "cosmetics" as "a preparation (except soap) to be applied to the human body for beautifying, preserving, or altering the appearance of a person (as for theatricals) or for cleansing, coloring, conditioning, or protecting the skin, hair, eyes, or teeth."

We are not convinced that this single, expansive definition of "cosmetics," covering virtually every conceivable preparation that could be applied to any part of the body, accurately reflects the typical consumer's perception of this term. There is no evidence that the specific products identified in these registrations, that is, hair care preparations such as shampoos

and hair conditioners, would be perceived by the typical purchasers of those goods as "cosmetics,"¹¹ or that such purchasers would believe that shampoos and hair conditioners are produced by the same companies that produce cosmetics or cosmetic accessories.¹²

Moreover, the specific exclusion of soap products from this definition, and thus the effective exclusion of shampoo, results in a truly artificial distinction between which products are, and which products are not, "cosmetics," and leaves us with further doubt that this definition accurately reflects the realities of the marketplace.

Thus, we cannot find, at least based on this record, that hair care preparations and cosmetics are legally identical products. Nor is the evidence sufficient to show that hair care preparations are so closely related to cosmetics that purchasers

¹¹ In fact, it is more likely that such products would be referred to as "toiletry" items.

¹² Applicant originally included shampoo and hair conditioner in its identification of goods and subsequently deleted those goods in response to the examining attorney's refusal to register. The examining attorney argues that applicant's inclusion of these goods in its original application is evidence that these items would be considered a natural expansion of applicant's cosmetic products. We fail to see how goods that have been deleted from an intent-to-use application would be considered evidence of an expansion, natural or otherwise.

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would naturally expect these products to emanate from the same source.¹³

Registration No. 782185

The examining attorney contends that the astringent product offered under applicant's mark SEAL "is seen to include" registrant's "preparation for filling skin pores with an innocuous material to keep out certain irritants" which is offered under the mark SEALSKIN (brief, p. 8). The dictionary entry submitted by the examining attorney defines "astringent" as "having the property of drawing together the soft organic tissue: contracting, constricting."

The relationship between these two products is unclear. Although both products are used on the skin, the examining attorney has not explained, and it is simply unclear from the definition alone, how a product that performs by contracting and constricting soft organic tissue would, as the examining attorney claims, "include" a material that fills skin pores. By its very nature, at least based on this definition, an astringent would

¹³ The examining attorney points to the case of *Cosmetically Yours, Inc. v. Clairol Incorporated*, 165 USPQ 515 (CCPA 1970) in support of his position that hair care preparations and cosmetics are closely related products. In that case, the Court specifically noted that the record before the Board showed that a number of leading cosmetic companies market both hair preparations and facial cosmetics. There is no such evidence in this case. We are required to decide each case based on its own facts and record, not the facts and record in a different case.

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appear to be a distinctly different product with a distinctly different function and effect.

Registration No. 2528395

As to this registration, the examining attorney maintains that applicant's shower gels, body lotions and hand creams offered under the mark SEAL are related to registrant's moisturizing component as used in an ingredient complex in those same products offered under the mark HYDRO SEAL.

While there may be an inherent relationship between these products, we have no evidence that the products would be encountered in the same channels of trade by the same purchasers. It is not unreasonable to assume that the moisturizing component of an ingredient complex of, for example, hand cream would be marketed to manufacturers of the hand cream while the hand cream containing the component would be sold to ultimate consumers. There is nothing in the record to indicate that the purchasers of shower gel, body lotion and hand cream with a moisturizing component of an ingredient complex would ever be exposed to or be aware of a separate mark for a component of those products, or that the mark for a component would even be used in the retail market or appear on the end product at all.

CLASS 18
Registration No. 1749402

The examining attorney argues, without evidence, that the handbags, purses, backpacks, briefcases, cosmetic bags and toiletry cases, vanity cases, wallets and change purses offered under applicant's SEAL mark are related to the goods in Registration No. 1749402 (SEAL PAK stylized) for fanny packs, hip packs, and waist packs.

Fanny packs and waist packs on the one hand and handbags and purses on the other are broadly related goods. However, there is simply no evidence that these goods are so closely related that, notwithstanding the differences in the marks used thereon and, in particular, the different suggestive meanings of the marks in relation to the respective goods, purchasers would mistakenly believe that these goods emanate from, or are associated with, the same source.

CLASS 42
Registration No. 1884104

The examining attorney contends that registrant's mail order services in the field of luggage offered under the mark SEALCO would encompass the specific travel bags, including handbags and purses, identified in the application for SEAL. The dictionary entries submitted by the examining attorney define "handbag" as a "traveling bag"; and define "luggage" as "suitcases, travelling

[sic] bags, and other articles containing a traveler's belongings."

Applicant's goods and registrant's services are obviously different in kind. On the other hand, it is true that goods, on the one hand, and services that deal with those goods, on the other, may be found to be related. However, the examining attorney has not shown that to be the case with respect to the particular goods and services at issue here. Registrant's services deal with luggage. A handbag is not luggage, it does not serve the same function as luggage, and it is not an effective substitute for luggage.

Moreover, it is not relevant that luggage and handbags can both be described as "traveling bags." Registrant's mail order services are not for traveling bags, but specifically for luggage. There is no evidence that mail order services or other retail outlets for luggage also typically include the sale of handbags. See, e.g., 4 McCarthy on Trademarks and Unfair Competition § 24:25 (4th ed. 2004) (stating that "[w]here the services consist of retail sales services, likelihood of confusion is found when another mark is used on goods which are commonly sold through such a retail outlet").

Conclusion

Considering in each case the cumulative effects of the differences in the marks and the differences in the essential

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characteristics of the goods and services, and, at least with respect to Registration No. 2528395, the differences in the channels of trade and classes of purchasers for applicant's and registrant's goods, we find that there is no likelihood of confusion as to any of the cited registrations.

Decision: The refusal to register is reversed.